

Serial No.: 10/696,683
Applicant: Gary L. Heiman

Attorney Docket: STAN-31
Examiner: Jenna Leigh Befumo

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Commissioner for Patents
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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Applicant requests review of the June 15, 2007 rejection. No amendments are filed herewith. This Request is being filed concurrently with a Notice of Appeal and time extension.

REMARKS/ARGUMENTS FOR REVIEW

Claims 1, 3, 14, 16, 33, and 38-40 are rejected under 35 U.S.C. 102(b) by Love, III et al US Patent Application No. 2004/0229538 ("Love"); Claims 36 and 37 are rejected under 35 U.S.C. 103(a) over Love; Claims 1, 3, 14, 16, 33, and 35-40 are rejected under 35 U.S.C. 103(a) over Collier U.S. Patent No. 5,487,936 ("Collier") in view of Lovingood U.S. Patent Application No. 2003/0190853 ("Lovingood") and over Standard Textile's Heiman patent U.S. Patent No. 5,495,874 ("Heiman") in view of Fairchild's Dictionary of Textiles ("the Fairchild Dict."). Claims 1, 3, 14, 16, 33, and 35-37 are rejected on nonstatutory obviousness-type double patenting over claims 1-21 of Heiman in view of the Fairchild Dict. The remarks focus on independent

claim 1, with specific mention of claim 33 where thought to be useful. For brevity, Applicant refers to arguments in the Amendment with RCE filed March 29, 2007 ("Amend RCE").

The Invention

A woven fabric sheeting construction of warp yarn floats that repeat along substantially the length of respective warp yarns in a defined float pattern (e.g., 2/1, 3/1, or 4/1 float patterns) and a synthetic multifilament yarn in the filling. The construction brings a greater proportion of the floated yarns (i.e., the floated warp yarn) to the surface of the sheeting to increase surface tactile comfort. The floated warp yarns, of which at least one warp yarn is a spun yarn of natural fibers, may be said to be "comfort yarn". The synthetic filament yarn enhances the durability of the sheeting. The construction also provides differentially elevated and/or depressed areas or designs on the surface of the sheeting, which may create pathways for increased airflow through and/or across the sheeting. This feature enhances comfort and positively impacts skin care. *See e.g.*, paragraphs [0007], [0009], [0019], and [0020]. Claim 1 (and claim 33) requires, in part:

- a. "a weave pattern which includes a plurality of warp yarn floats repeating along substantially the length of respective ones of the warp yarns in an x/y float pattern";
- b. "wherein each of x and y are whole numbers greater than zero (0), x is at least two (2), and x is greater than y"¹; and
- c. "at least one of the warp yarns being a spun yarn of natural fibers".

Love

Examiner acknowledges that the woven fabrics of Love are made from synthetic fibers, blends of two or more types of synthetic fibers, or blends of synthetic fibers and natural fibers. Claim 1 (and 33) specifically requires that at least one yarn, i.e., one warp yarn, be made solely

¹ Claim 33 calls for a 2/1 weave pattern which, for present purposes, could be treated as if claim 33 were a dependent claim depending from claim 1 and reciting x = 2 and y = 1.

of natural fibers. To that end, Love, at best, only teaches blends of natural and synthetic fibers, not natural fibers alone for use as yarns, as explained in detail at pages 8-9 of Amend RCE. As such, there is no teaching in Love of a woven fabric having a spun yarn, let alone a spun warp yarn, made solely of natural fibers. Thus, the anticipation rejection is overcome.

Collier and Lovingood

Examiner acknowledges that Collier fails to teach using a 2x1, 3x1, or 4x1 twill structure, which are species of the genus covered by claim 1. Collier is directed to coloring woven fabric to exhibit a shot silk effect that is achieved by a 1x1 plain square weave in combination with a substantially even density of the warp and weft threads. Examiner resorts to the Lovingood reference to substitute a 2x1 twill weave pattern for Collier's even weave. This combination is erroneous for the following reasons as explained in greater detail at pp 9-13 of Amend RCE.

Lovingood explains that its fabric product and the woven fabric product of Collier are "substantially different". Thus, there is a fundamental flaw in concluding that these references can be combined when one on its face states that its product is substantially different from that of the other. Also, if the 2x1 twill weave pattern of Lovingood is combined into the woven fabric of Collier, it would destroy the desired visual effect of shot silk. Collier, at best, suggests that the cloth may be patterned, at intervals, to introduce variations from the ground. Thus, the result would not be a warp float pattern that repeats along substantially the length of any warp yarn. Rather, the warp float pattern would change at sporadic, and ill-defined "intervals", therealong. Again, the present invention requires a weave pattern that includes a plurality of x>y warp yarn floats (such as 2/1) repeating along substantially the length of respective ones of the warp yarns.

To obtain Applicant's claimed woven fabric, the specific ground weave constructions of Collier, e.g., 1x1 plain square weave or 2x2 twill weave, would need to be wholly replaced by the 2x1 twill weave pattern of Lovingood. That is directly at odds with Collier as it would destroy the shot silk effect that is achieved by an even weave pattern.

Heiman and Fairchild's Dict. – Obviousness and Double Patenting

Concerning obviousness, Examiner recognizes that Heiman fails to teach a weave pattern using warp yarn floats where x is greater than y. Heiman expressly discloses a plain weave and does not make mention of other patterns. Nevertheless, Examiner turns to the Fairchild Dict. for its generic mention that twill weaves are commonly known woven fabric structures used to produce strong, durable fabrics with the smallest twill being a 2/1 twill. This combination is erroneous for the reasons that follow as explained in greater detail at pp 13-15 of Amend RCE.

Examiner asserts that Heiman suggests that alternate weaves may be used because the claims of Heiman are not limited to plain weave. However, it is well known that claims do not teach. Rather, "specifications teach. Claims claim". *SRI Int'l v. Matsushita Elec. Corp. of America*, 227 USPQ 577, 585 n. 14 (Fed. Cir. 1985) (*en banc*). Thus, there is no legally cognizable basis to rely on the claims of Heiman as if they teach all possible weave constructions. There is no law that supports the notion that a generic claim teaches or discloses each and every species that the claims might reach. Therefore, it is improper for Examiner to look to the claims as a basis for the obviousness rejection. Also, there is no mention of float patterns or of "twill" in Heiman. Nor does the mere mention in the Fairchild Dict. of a 2/1 twill weave add anything of value, for that has nothing to do with Heiman's plain weave. Also, the

twill weave definition clearly states that "one of the most popular weaves...[is] even sided twill, two up, two down [2/2]". Even assuming one might modify Heiman, how can it be that one would choose a 2x1 twill weave (or 3x1 or 4x1) over the more common 2x2 twill weave for modifying the plain weave of Heiman? The answer is clear: one would not but for the knowledge gleaned from Applicant's own disclosure. That is impermissible hindsight.

With respect to double patenting, this rejection is analogous to a failure to meet the requirements of 35 U.S.C. 103, therefore, the above obviousness analysis is more than sufficient to defeat this rejection. As explained above, the disclosure of Heiman involves a 1x1 plain weave, and thus, does not teach the claimed float pattern, nor would it have been obvious to modify Heiman to achieve the claimed invention. Even assuming *arguendo* that the claims of Heiman are not limited to a 1x1 plain weave, the double-patenting rejection cannot stand because Heiman represents a genus (any float pattern) and the Applicant's claims represent a species (specific relation of a float pattern with $x > y$). Indeed, there is nothing in the art cited by Examiner that would lead one to modify Heiman's claims to such a construction.

Conclusion

As evidenced above, the claims are not anticipated by or obvious over the cited art. Hence, Applicant respectfully asserts that the rejections are clearly in error.

Respectfully submitted,
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